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IN THE COURT OF APPEALS OF INDIANA

TIMOTHY DILLOW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 88A05-0507-CR-400
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WASHINGTON CIRCUIT COURT
The Honorable Robert Bennett, Judge
Cause No. 88C01-9911-CM-302, 88C01-0009-CV-280 & 88C01-0009-CF-298

August 23, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Timothy Dillow appeals his convictions for stalking as a class C felony[1] and two counts of invasion of privacy as class B misdemeanors.[2] Dillow raises one issue, which we restate as whether his convictions violate the federal and state prohibitions against double jeopardy. We affirm in part, reverse in part, and remand.

The relevant facts follow. On November 30, 1999, the State charged Dillow with trespass as a class A misdemeanor[3] and mischief as a class B misdemeanor.[4] On September 15, 2000, the State charged Dillow with two counts of invasion of privacy as class B misdemeanors. In one of the counts, the State alleged that Dillow "knowingly or intentionally violated a Protective Order, issued under I.C. 34-4-5.1, by harassing or disturbing the peace, of Lisa Dillow, by sending attached letter [on July 21, 2000]." Appellant's Appendix at 178. On September 28, 2000, the State charged Dillow with stalking as a class C felony and alleged that Dillow "stalk[ed] another person, to-wit: Lisa Dillow and a protective order under I.C. 34-4-5.1 has been issued by the Washington Circuit Court to protect the same victim, Lisa Dillow from [Dillow] and [Dillow] has been given actual notice of said order." Id. at 187.

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[1] Ind. Code § 35-45-10-5 (subsequently amended by Pub. L. 280-2001, § 52 (eff. July 1, 2001); Pub. L. No. 133-2002, § 66 (eff. July 1, 2002)).

[2] Ind. Code § 35-46-1-15.1 (subsequently amended by Pub. L. No. 1-2001, § 42 (eff. July 1, 2001); Pub. L. No. 280-2001, § 53 (eff. July 1, 2001); Pub. L. No. 1-2002, § 150 (eff. March 14, 2002); Pub. L. 133-2002, § 67 (eff. April 2, 2003)).

[3] Ind. Code § 35-43-2-2 (2004).

[4] Ind. Code § 35-43-1-2 (subsequently amended by Pub. L. No. 108-2002, § 1(eff. July 1, 2002); Pub. L. No. 123-2002, § 37 (eff. July 1, 2002); Pub. L. No. 116-2002, § 24 (eff. Jan. 1, 2003); Pub. L. No. 1-2003, § 95 (eff. April 2, 2003)).

The charges were consolidated, and at the jury trial, the State argued during closing argument that one count of invasion of privacy was supported by evidence of a "road rage" incident in which Dillow threatened Lisa and tried to run her off of the road. Transcript at 712. The State argued that the other invasion of privacy charge was supported by evidence that Dillow sent Lisa a letter on July 21, 2000. The State argued that the stalking charge was supported by evidence that Dillow repeatedly called Lisa, sent her letters, spied on her, followed her, threatened her, and confronted her at their son's pediatrician's office. The jury found Dillow guilty as charged.

The trial court sentenced Dillow to concurrent sentences of 180 days for the trespass conviction and 180 days for the mischief conviction, concurrent sentences of 180 days for each invasion of privacy conviction, and four years for the stalking conviction. The trial court ordered that the concurrent sentences for the trespass and mischief convictions be served consecutive to the concurrent sentences for the invasion of privacy convictions and consecutive to the stalking conviction sentence for an aggregate sentence of five years in the Indiana Department of Correction. The trial court suspended two years of the five-year sentence.

The sole issue is whether Dillow's convictions for invasion of privacy and stalking violate Indiana's prohibition against double jeopardy. The State argues that Dillow's failure to object at the sentencing hearing based upon double jeopardy constituted waiver. Generally, a failure to object to error in a proceeding, and thus preserve an issue on appeal, results in waiver. Brabandt v. State, 797 N.E.2d 855, 861 (Ind. Ct. App. 2003).

However, a court may remedy an unpreserved error when it determines the trial court committed fundamental error. Id. An improper sentence constitutes fundamental error and "cannot be ignored on review." Morgan v. State, 417 N.E.2d 1154, 1156 (Ind. Ct. App. 1981). We may correct sentencing errors by the trial court on appeal even though the issue was not raised below. Id. Thus, we will address Dillow's arguments on the merits.

Article I, Section 14 of the Indiana Constitution provides in part that: "No person shall be put in jeopardy twice for the same offense." The Indiana Supreme Court held in Richardson v. State that:

> two or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Both of these considerations, the statutory elements test and the actual evidence test, are components of the double jeopardy "same offense" analysis under the Indiana Constitution.

717 N.E.2d 32, 49-50 (Ind. 1999) (footnote omitted).

Here, Dillow concedes that his convictions for invasion of privacy and stalking do not violate the statutory elements test but argues that his convictions violate the actual evidence test.[5] Under the actual evidence test, we examine the actual evidence presented at trial to determine whether each challenged offense was established by separate and

[5] Dillow also mentions Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932), but the statutory elements test is identical to the federal double jeopardy analysis under Blockburger. Consequently, Dillow's argument regarding Blockburger fails.

distinct facts. Id. at 53. "To show that two challenged offenses constitute the 'same offense' in a claim of double jeopardy, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." Id. The Indiana Supreme Court has clarified that, "under the Richardson actual evidence test, the Indiana Double Jeopardy Clause is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense." Bald v. State, 766 N.E.2d 1170, 1172 (Ind. 2002) (quoting Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002)). See also Redman v. State, 743 N.E.2d 263, 267 (Ind. 2001); Miller v. State, 790 N.E.2d 437, 439 (Ind. 2003). Moreover, "double jeopardy under this test will be found only when it is reasonably possible that the jury used the same evidence to establish two offenses, not when that possibility is speculative or remote." Hopkins v. State, 759 N.E.2d 633, 640 (Ind. 2001).

According to Dillow, the evidence used to establish his conviction for one count of invasion of privacy also was used to establish his conviction for stalking.[6] Specifically, Dillow argues that the July 21, 2000, letter and the protective order were used to establish both the invasion of privacy and stalking convictions. On the other hand, the State argues that "the actual evidence (State's Exhibit 12a [the July 21, 2000 letter]) establishing the

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[6] Dillow makes no argument concerning his other invasion of privacy conviction which related to the road rage incident.

essential elements in this particular Invasion of Privacy charge was not used by the jury as evidence of any of the essential elements of the Stalking charge, let alone used to establish all of the essential elements of the Stalking charge." Appellee's Brief at 10. We must disagree with the State.

To establish the invasion of privacy charge, the State was required to prove that Dillow knowingly or intentionally violated a protective order by sending a letter to Lisa on July 21, 2000. I.C. § 35-46-1-15.1. To establish the stalking charge, the State was required to prove that Dillow stalked Lisa, a protective order had been issued, and Dillow had notice of the protective order. I.C. § 35-45-10-5. In support of the stalking charge, the State argued during closing arguments that Dillow repeatedly called Lisa, sent her letters, spied on her, followed her, threatened her, and confronted her at their son's pediatrician's office. Although several letters from Dillow to Lisa were submitted into evidence, the State made no attempt to separate the July 21, 2000 letter from the facts presented to support the stalking offense. Consequently, there is a reasonable probability that evidentiary facts establishing the essential elements of the stalking offense also established all of the essential elements of the invasion of privacy offense. See, e.g., Davis v. State, 770 N.E.2d 319, 324 (Ind. 2002) (vacating an aggravated battery conviction where a reasonable possibility existed that the jury used the evidence proving the elements of attempted murder to also established the elements of aggravated battery), reh'g denied; cf. Simms v. State, 791 N.E.2d 225, 231-232 (Ind. Ct. App. 2003) (holding

that no double jeopardy violation under the actual evidence test occurred as a result of the defendant's convictions for violating a protective order and stalking because the State presented "very different" evidence regarding the charges). To eliminate the double jeopardy violation, we remand and instruct the trial court to vacate Dillow's invasion of privacy conviction related to the July 21, 2000 letter. However, because Dillow's 180-day sentence for the invasion of privacy conviction was concurrent with his other 180-day sentence for the second invasion of privacy conviction, which Dillow did not challenge, Dillow's aggregate five-year sentence will remain the same.

For the foregoing reasons, we affirm Dillow's convictions for stalking as a class C felony, invasion of privacy as a class B misdemeanor, trespass as a class A misdemeanor, and mischief as a class B misdemeanor but reverse Dillow's conviction for invasion of privacy as a class B misdemeanor.

Affirmed in part, reversed in part, and remanded.

NAJAM, J. and ROBB, J. concur